IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

MONDAY, THE 17TH SEPTEMBER 2007 / 26TH BHADRA 1929

OP.No. 31297 of 2000(A)

PETITIONER:

M/S. HARRISONS MALAYALAM LIMITED
A COMPANY INCORPORTATED UNDER THE
COMPANIES ACT, 1956 HAVING IT REGISTERED
OFFICE AT 24/1624, BRISTOW ROAD,
WILLINGDON ISLAND, COCHIN- 682 003.
REPRESENTED BY ITS CHIEF MANAGER-
LEGAL V.VENUGOPAL.

BY ADV. SRI.A.M.SHAFFIQUE

RESPONDENTS:
----

1. **V.M.MEERA, D/o. LEELA AMMA,**
   RAMA NILAYAM, KASABA AMSOM
   AND DESOM, KOZHIKODE.

2. **V.M. MURALIDHARAN, S/o. LEELA AMMA,**
   RAMA NILAYAM, KASABA AMSOM AND
   DESOM, KOZHIKODE.

3. **KUNCHICHA BEEVI, W/o. V.K.THANGAL,**
   N.C.DIVISION, ARRAPETTA ESTATE,
   MEPPADI P.O.,
   VYTHIRI TALUK, WAYANAD DIST.

4. **ROBERT JOSEPH, ST.XAVIER'S MOUNT,**
   MUPPAINAD, MEPPADI P.O.,
   VYTHIRI TALUK, WAYANAD DIST.

5. **FR.MACHIAVEETTIL MARCELINE,**
   B.TH. ST.JOSEPH'S CHURCH,
   MEPPADI P.O., VYTHIRI TALUK, WAYANAD DIST.

6. **THE DISTRICT COURT, KALPETTA,**
   WAYANAD DIST.

**7. THE SUBORDINATE JUDGE'S COURT,
SULTHAN BATHERY, WAYANAD DIST.**

**BY ADV. SRI.KALEESWARAM RAJ
SRI.A.P.CHANDRASEKHARAN (SR.)
SMT.PRABHA R.MENON
SRI.PUSHPARAJAN KODOTH
SRI.M.KRISHNAKUMAR
SRI.K.JAYESH MOHANKUMAR**

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 17/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.53166/2000 IN O.P.NO.31297/2000

DISMISSED

17.09.2007 **Sd/- THOTTATHIL B.RADHAKRISHNAN,JUDGE**

APPENDIX

PETITIONERS EXHIBITS:

EXT.P1: COPY OF THE JUDGMENT OF THE COURT OF SUBORDINATE JUDGE, SULTAN BATHERY, DATED 30.9.1986(O.S.No.52/85)

EXT.P2: COPY OF THE JUDGMENT OF THE DISTRICT COURT, WAYANAD, KALPETTA, DT.30.03.1991 IN A.S.NO.7/1987.

EXT.P3: COPY OF THE MEMORANDUM OF APPEAL FILED BY THE PETITIONER-C.M.A.NO.224/1991.

EXT.P4: COPY OF THE JUDGMENT IN CMA.NO.224/1991 DATED 31.03.1997.

TRUE COPY

P.A.TO JUDGE

THOTTATHIL B.RADHAKRISHNAN,J

==========

O.P.No.31297 of 2000

==========

Dated this the 17th day of September, 2007

JUDGMENT

The petitioner is the first defendant in a suit for recovery of possession. On contest being raised claiming the benefits of the provisions of the Kerala Land Reforms Act 1953, the trial court referred to the question of tenancy to the Land Tribunal. That resulted in findings by the Land Tribunal, which were incorporated in Ext.P1 judgment in the suit. In the first appeal, the lower appellate court issued Ext.P2 order of remand setting aside the decree of the trial court and directing fresh disposal of the suit according to law, untrammeled by any of the observations in Ext.P2 judgment. However, there was a clear direction in the penultimate para of that order of remand that the question of tenancy need not be referred again to the Land Tribunal and the trial court was to decide all the issues. This Court refused to interfere with Ext.P2 order of remand while it dismissed Ext.P3 appeal, against it, as per Ext.P4 judgment. The petitioner/first defendant filed S.L.P.(C).No.15383/1997

against Ext.P4 judgment of this Court. Leave appeal was refused by the Apex Court.

2. This writ petition is filed thereafter on the premise that it was not urged by the petitioner before this Court or before the Apex Court that the directions contained in Ext.P2 order of remand directing that the issue of tenancy be dealt with by the trial court itself without making an order of reference to the Land Tribunal is without jurisdiction in terms of Section 125 (3) of the KLR Act. This writ petition is filed by contending that directions contained in Ext.P2 order of remand authorising the trial court to decide the issue of tenancy without reference to the Land Tribunal is wholly without jurisdiction and such lack of jurisdiction is not only one that goes to the root of the matter, but that which contradicts the expressed embargo in Section 123 (3) of the KLR Act and therefore, void and inoperative. It is contended that the earlier judgment of this Court in the appeal and the decision of the Apex Court refusing leave to appeal do not preclude the petitioner from raising that contention in this writ petition.

3. Learned counsel for the plaintiff argues that this is an instance of abuse of the process of court and there is no lack of jurisdiction for the appellate court in terms of Section 125(3) of the KLR Act, while making an order of remand. It is further contended that the issue raised are concluded by the judgment of this Court and the order of the Apex Court refusing to grant special leave to appeal.

4. It needs not much of labour to recall the string of decisions of this Court and that of the Apex court to conclude that the inhibition imposed by Sub Section 3 of Section 125 of KLR Act on the trial court is absolute. The decision of this Court in **Parameswaran Thampi v. Bodiyan Thomas (1984 KLT 397)** is referred. It has been partly interfered with the Apex Court in **Mathevan Padmanabhan v. Parameswaran Thampi (1995 Supp(1) SCC 479)** which was rendered taking the view that the trial court, subsequent to a binding remand order which directs a fresh enquiry, is not tied down by Section 125(3) of the KLR Act. The said decision of the Division Bench of this Court was referred to in **Chathu Nair v. Chirutheyi Amma (1985 KLT 164)** by the Division Bench stating that:

> "We do not understand the observations of the Division Bench in 1984 KLT. 397 as one laying down a proposition that it shall not be open to the trial court to refer the disputed question of tenancy again under Section 125(3) of the Kerala Land Reforms Act, once, on a reference under that sub-section, that Tribunal had given a decision on that question, but on appeal, the appellate court has set aside the judgment based on the decision of the Land Tribunal, directing a fresh disposal according to law. (Allowing the parties to amend the pleadings and to adduce fresh evidence in support of the disputed tenancy in this case). Assuming that it might not be necessary to refer the question of tenancy to the Tribunal again, after the remand, there could be no bar against such reference being made after the remand in accordance with the true spirit of the provisions of Section. 125 of the Act."

5. An analysis of the aforesaid judgment would show that an order of remand does not specifically compel the trial court to consider the issue of tenancy by itself. It is for the trial court to decide as to whether the reference is to be made and the trial court has the statutory obligation under Section 125(3) of the KLR Act to make such reference. But this embargo on the trial court under Section 125(3) of KLR Act would not come into play on the face of any positive directions by the superior court

which passes an order of remand in exercise of authority under Section 96 or under Section 100 of Code of Civil Procedure read with Order 41 Rule 23 thereof. This is because while the remanding court issues such directions, those directions get its authority trickling down from Sections 96 and 100 of the Code of Civil Procedure, as the case may be, while the embargo under Section 125(3) of the KLR Act is confined to the trial court and such embargo does not visit the jurisdiction of this superior appellate courts. So much so, the appellate court would be competent to issue a direction to the trial court to decide a question of tenancy by itself, without making a reference under Section 125(3) of the KLR Act and if such direction is specific, the trial court is bound to obey the command in the remand order and would not be tied down by Section 125(3) on the face of the directions of the superior court.

6. In the case in hand, as already noticed, there is a categoric direction in the penultimate paragraph of Ext.P2 order of remand that the trial court need not refer the question of tenancy of Land Tribunal and that the said issue shall be decided by the trial court itself. That command is with authority

and is finally on the trial court de-hors Section 125(3) of the KLR Act.

7. Apart from the aforesaid, it has to be noticed that the illegality, impropriety and irregularity of Ext.P2 order of remand could have been dealt with by this Court in the C.M. Appeal. Under the provisions of Section 11 of the Code of Civil Procedure, the public policy inbuilt in the concept of res-judicata, to prevent successive scouting of the courts and the quality and responsibility of the jurisdiction under Section 104 read with Section 100 of the Code of Civil Procedure and the spread of Article 227 of Constitution would advice that a person challenging an order of remand ought to raise all contentions in opposition to the order of remand or otherwise face conclusiveness of the order of remand. The principles of “might and ought to” contained in explanation 4 to Section 11 of the Code of Civil Procedure applies. Ext.P2 order of remand, having been confirmed by this Court, and the petitioner/first defendant having been unsuccessful before the Apex Court, with this application for special leave to appeal against that judgment of this Court, the irregularity, impropriety and illegality of the

direction of the lower Appellate Court to the trial court to decide the issue of tenancy by itself cannot be raised in this writ petition.

For the forgoing reasons, this writ petition is dismissed. There will be a direction to the trial court to expedite the final disposal of the suit and to make every endeavor to give it top priority for consideration and disposal in accordance with law.

THOTTATHIL B.RADHAKRISHNAN, JUDGE

dvs